

Exhibit A

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION MDL NO. 2804
OPIATE LITIGATION

Case No. 17-md-2804
Judge Dan Aaron Polster

This Document Relates To:
City of Rochester v. Purdue
Pharma, L.P.
No. 19-op-45853 (Track 12)
County of Webb, Texas v.
Purdue Pharma, L.P.
No. 18-op-45175 (Track 15)

TELEPHONIC STATUS CONFERENCE CALL BEFORE
Special Master David Cohen
December 6, 2024
Scheduled for 4:30 p.m. EST

REPORTED BY: DANA S. ANDERSON-LINNELL
Job No.: 7063327

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18 Peter J. Mougey, Esquire

19 Laura Dunning, Esquire

20

21 (Some participants may not be listed.)

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1 SPECIAL MASTER COHEN: Okay. Thank
2 you everybody for getting on the phone dealing
3 with the discovery dispute today with regard to
4 plaintiffs' expectation/request for personnel
5 files for three upcoming depositions, three
6 upcoming deponents. And I'd like to start with
7 just a slightly better understanding of who
8 these deponents are and what they do. So I did
9 read the emails, but frankly, I'm not sure I
10 understand exactly what they mean.

11 Andrew, do you want to start?

12 MR. HATCHETT: Yeah. And this is
13 where the poor court reporter, Dana, is going
14 to feel like we've already misled her, but if
15 we are going to be describing in more detail
16 who these witnesses are and what they
17 [unintelligible] I'm going to ask to introduce
18 a new colleague of mine, Emily McGowan, who I
19 hope is on the line. And I'm actually going to
20 let her be the one to speak more to that.

21 SPECIAL MASTER COHEN: Okay. So let
22 me do it this way, Emily. The two deponents, I
23 understand, from Optum are going to be

24 [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

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MS. MCGOWAN: Yes, Special Master.

This is Emily McGowan for Optum Rx from
Alston & Bird. So medical directors may play a
number of different roles, but our
understanding

SPECIAL MASTER COHEN: Okay. So
that's where I kind of read -- I read that and
don't really -- still don't really understand
it. I don't understand. Why is there a
clinical education program? Who's taking it?
Who's taking that program? Why are they taking
the program? Why is he vetting them? And I'm
sorry to be obtuse, but I'm not sure I
understand what the point of it is.

MS. MCGOWAN: Hopefully, I can
explain some more. So there are a number of
clinicians who work within the Optum Health
organization and have historically worked
within that organization over the years, from

1 case managers to nurse practitioners to
2 doctors. And those individuals may require
3 from time to time additional education or
4 continuing medical education. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

11 SPECIAL MASTER COHEN: And does this
12 all go to what is on a formulary or whether a
13 drug is going to be approved? I mean, I'm
14 still trying to understand kind of in a large
15 way what all this has to do with.

16 MS. MCGOWAN: Right. So Optum
17 Health is not a pharmacy benefit manager like
18 Optum Rx. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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SPECIAL MASTER COHEN: When you say "members of plans that are getting services from Optum Health," you're talking about Joe patient insured?

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MS. MCGOWAN: Correct. So if a plan uses Optum Health, for example, to assist in care management services, then the clinician that works for Optum Health might have, you know, some role, for example, in evaluating like a clinical program for diabetes, for example, to help those members who have diabetes manage their care. It would be like an add-on program, something like that.

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SPECIAL MASTER COHEN: [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Can you give me a -- sketch that out?

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MS. MCGOWAN: [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED]

SPECIAL MASTER COHEN: Okay. And before I change subjects -- and I'm going to stick with those two deponents -- Mike Elsner, do you have anything that you would add to my understanding of those individuals and why you need their personnel files and what you're looking for from those files?

MR. HATCHETT: This is Andrew Hatchett. [REDACTED]

[REDACTED] And Emily can provide more color if that's not clear to you, Special Master Cohen, but just want to make sure that you understood the distinction.

SPECIAL MASTER COHEN: Got it. Thank you.

MR. ELSNER: I'm happy to add a few points of color [REDACTED]

1 Before I do, though, I just want to go back to
2 where we were, which is the deposition protocol
3 in the MDL since 2018.

4 SPECIAL MASTER COHEN: I know where
5 we were. We'll get to that, Mike. Just answer
6 my question.

7 MR. ELSNER: All right. [REDACTED]

8 [REDACTED] was a key
9 opinion leader for Purdue. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED] and
16 then I'll get back to why we need them. [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] So she falls more, as we understand it, in a role that would be more familiar to you from sort of a Nicole Harrington world at CVS and those involved in those kinds of programming decisions.

SPECIAL MASTER COHEN: And let me just ask real quick, Mike. [REDACTED]

[REDACTED]

[REDACTED]

MR. ELSNER: That's correct. [REDACTED]

[REDACTED]

SPECIAL MASTER COHEN: Okay. Go ahead. Yeah. Okay. So I think I understand what these two folks did.

MS. MCGOWAN: I'm sorry. Special Master Cohen, this is Emily McGowan for Optum Rx. Could I just make a few points of clarification? Because we do not agree with the statements that Mr. Elsnor just made about these two individuals. So we disagree that [REDACTED] is a key opinion leader for Purdue. That's --

1 SPECIAL MASTER COHEN: I'm sure you
2 do.

3 MS. MCGOWAN: [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 SPECIAL MASTER COHEN: Okay.

14 MR. HATCHETT: [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 SPECIAL MASTER COHEN: And who is
18 the third deponent? I've lost track now.

19 MR. WASSERMAN: This is Matthew
20 Wasserman for Express Scripts. That would be

21 [REDACTED] for Express Scripts. He's a
22 former employee. He was the [REDACTED]

23 [REDACTED] at Express Scripts from 2006 to 2018.

24 And just to add some more color about what that
25 title actually means and entails, he was

1 basically the lead of [REDACTED] and
2 [REDACTED] for the company. So he
3 would interface with different client groups.
4 He would [REDACTED]
5 [REDACTED] speaking to mostly
6 drug-saving initiatives, other products that
7 Express Scripts was launching. And, you know,
8 his background search is a Ph.D.

9 SPECIAL MASTER COHEN: Okay. Let me
10 just pull something up.

11 MS. DUNNING: Special Master Cohen,
12 this is Laura Dunning for the plaintiffs. I
13 would also add that [REDACTED], in addition to
14 being the [REDACTED] and serving in
15 some of the roles that Mr. Wasserman just
16 discussed, he also worked in the Office of
17 Clinical Evaluation and Policy, which was
18 directly involved in determining what drugs go
19 on formulary from a clinical perspective.

20 SPECIAL MASTER COHEN: All right.
21 So look, I don't need you to -- in fact, you
22 did. So it was helpful. I don't need to go
23 over how we got to where we got to, that is to
24 say the history of production of information
25 from personnel files through -- starting with

1 Track 1 to today. And I understand that
2 plaintiffs essentially thought that the status
3 quo was every deponent, their personnel file
4 was produced. I actually think that's not
5 exactly where things were left. I think that
6 certain documents from a personnel file were
7 certainly ordered to be produced. And it may
8 have turned into a de facto status quo that,
9 quote, unquote, everyone's personnel file was
10 produced from a former employee or an employee,
11 although that's not exactly where things were
12 left, as far as I was concerned. But, of
13 course, if the parties, you know, came to an
14 agreement, that's fine. The trick, though, is
15 that we've got different parties. And the PBMs
16 are correct that the judge has said: Look, you
17 know, these are certainly highly persuasive
18 rulings, but they are not automatics. And so I
19 want to start by reminding the plaintiffs --
20 because I think it's easy to fall into the trap
21 of -- I want to remind the plaintiffs of the
22 fact that, you know, the PBMs have a right to
23 raise issues that they think don't apply. And
24 you shouldn't simply rely on the status quo
25 every time, especially be -- when I go back and

1 look at what is recited to me as what the
2 status quo is isn't exactly the same as the
3 plaintiffs' understanding, again, maybe because
4 of agreements or, you know, just the practice
5 that came into being.

6 Having said all of that, so the
7 descriptions you just gave me make it
8 reasonably clear, but not entirely clear to me,
9 that we're not talking people who were sales --
10 in sales or marketing and might have had their
11 compensation based on, you know, the amount of
12 opioids that were dispensed or the amount of
13 opioids that were sold or anything like that.
14 So those kind of requirements or needs don't
15 appear to me to be what the plaintiffs are
16 after. They're really more after what I would
17 call more standard things in a file;
18 performance evaluations, compensation and, you
19 know, explanations of whether there are
20 bonuses. Those bonuses may not be based on
21 opioid sales, but they may still well be
22 relevant, things like that. Those things, I
23 think, are relevant or certainly discoverable
24 as a general matter.

25 And so where I'm landing -- and we

1 can talk about the contours of this. And both
2 of you can argue that I got it wrong to some
3 extent and maybe I'll reconsider. But where
4 I -- my tentative ruling, where I'm landing is
5 that is for employees and former employees the
6 kind of documents that are listed in what has
7 been referred to as page 3 of the Lanier letter
8 have to be produced three days before the
9 deposition. And those are, first of all, not
10 only opioid related, as was made clear in an
11 email and was made clear by the Court in that
12 email, I mentioned that I talked to Judge
13 Polster about it, and also are things that can
14 be redacted to the extent necessary. And I'm
15 not talking about for relevance. There will be
16 no redaction for relevance. There will be
17 redaction, though, of Social Security numbers,
18 things like that. The protective order is
19 going to apply to those. So that addresses the
20 privacy concerns.

21 And, you know, the documents listed
22 in the -- in that letter, those bullet points
23 include things like performance evaluations,
24 commendations, salary history, job
25 descriptions, things like that. And this goes

1 both ways, right? So this doesn't apply only
2 to the defendants' employees and former
3 employees. It applies to the plaintiffs'
4 employees and former employees.

5 So that's where I'm landing. And
6 now if somebody wants to jump up and down and
7 tell me I got it wrong and why, I'll listen to
8 that.

9 MR. HATCHETT: Special Master Cohen,
10 this is Andrew Hatchett. And I'll start. And
11 I'm not going to be jumping, but we do believe
12 you got it wrong. And so here's why. I will
13 give at least, you know, two reasons. So
14 one -- and this is a point that we, you know,
15 made in our email to Mr. Elsner and in our
16 email exchanges that have also copied you. One
17 starting threshold problem is the lack of a
18 document request seeking this information. And
19 so before this morning I didn't know that for
20 sure. When I saw the transcript from the
21 hearing that Mr. Elsner attached yesterday, it
22 looked to me like there had been a document
23 request asking for personnel file information
24 in other tracks, but I did not know it for
25 sure. I'm now looking at it because the prior

1 briefing has been provided to us. And so I'm
2 looking at a document request from plaintiffs
3 to the defendants, and it asks for things like,
4 A, all reviews, evaluations or assessments of
5 the witness' job performance related
6 specifically to opioid marketing and sales.
7 That's A. And it goes down. But there's an
8 Express document request for this information.
9 In the pharmacy track, I understand that there
10 was also a document request for this
11 information. That document request was served
12 because the defendants and other track, as I
13 understand it, said: We don't have to produce
14 this information absent a document request
15 because that's, in fact, what the Federal Rules
16 require. They require document requests before
17 you have to produce documents.

18 The PEC and the plaintiffs, of
19 course, have done this through many tracks.
20 They did not serve a document request on us
21 seeking this information. It does not exist.
22 And so as a threshold matter I think that that
23 is a failure on their part. Whether it's an
24 inadvertent mishap and they missed it, they did
25 not serve a document request. And so, you

1 know, it's our position that we shouldn't have
2 to produce documents without a document request
3 asking for the information.

4 The second --

5 SPECIAL MASTER COHEN: Andrew,
6 please remember your second point. I don't
7 want you to forget it. But I do want to take
8 them point by point. So let me interrupt you
9 and ask, I guess, Mike, to respond to that.

10 MR. ELSNER: Absolutely. Michael
11 Elsner, again, for the PEC. There was, as
12 Andrew stated, an initial 30(b)(2) document
13 request for certain records in Track 1. Once
14 the protocol had been ordered and agreed to and
15 then ordered by yourself, there were no other
16 document requests ever issued in any subsequent
17 track for any personnel file because it was
18 understood that the deposition protocol
19 required the production of personnel files.
20 And let me be clear. We were not seeking
21 complete personnel files beyond what you had
22 previously ordered in -- and in the bullets
23 that you described on page 3 of Mr. Lanier's
24 letter. Those are the exact types of
25 information that we were seeking here. We

1 weren't seeking anything beyond that because
2 that's what the protocol calls for. If the
3 protocol called for something else, we would
4 have asked for amendments to that if we felt
5 like we needed additional information.

6 MR. HATCHETT: This is Andrew
7 Hatchett. That protocol is something that I
8 literally had not seen until yesterday. So
9 I -- if it's an email that didn't copy any
10 party, didn't copy the PBM defendants, we
11 weren't party to that stage of the process. Of
12 course there is an order that's on the docket.
13 I think that's 1162, 1163 --

14 SPECIAL MASTER COHEN: 1163.

15 MR. HATCHETT: -- [unintelligible].
16 But that would not apply to any of these
17 witnesses because none of these are sales,
18 marketing people that were compensated based on
19 the sales and distribution of opioids. And so
20 I don't know how Mr. Elsner could believe that
21 we were -- had reached some understanding or
22 agreement to apply to some, quote, unquote,
23 protocol that was not even available to us.

24 SPECIAL MASTER COHEN: I understand.
25 Do you want to go ahead and hit on your second

1 point?

2 MR. HATCHETT: The second point I
3 would make is that it was also very clear from
4 the record that is now becoming available to us
5 is that there was an extensive effort as these
6 issues arose in different tracks for the
7 plaintiffs to make a showing, which is what the
8 law requires, as to the need for certain
9 categories and information from personnel files
10 for certain types of witnesses. And so it
11 appears that it started with the manufacturer
12 defendants and related to people who were
13 involved in the sales and marketing of opioids.
14 And so there was a focus on compensation and
15 bonus information related to sales and
16 marketing of opioids.

17 As it went on to Track 3, as you
18 look at the Lanier letter and email, there was
19 a discussion about how there was a concern that
20 the dispensing pharmacies had engaged in
21 compensating or providing a bonus structure
22 that incentivized dispensing pharmacists to
23 push out more volume of prescriptions because
24 they received a bonus or pay based on the
25 volume of dispenses. And so in each case there

1 was an attempt to come to the Courts and
2 explain specifically for certain categories of
3 witnesses why it is that their compensation or
4 their bonus information would be relevant to
5 the claims and issues in the case. And that
6 was done. For these witnesses -- [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] There's been no attempt to
12 explain why [REDACTED] compensation and bonus
13 information is relevant to anything, let alone
14 whether or not [REDACTED] was disciplined because he
15 stole someone's parking spot or wore, you know,
16 something wrong on casual Friday. So there's
17 all kinds of things, of course, that are in
18 employee files, but there's been no attempt to
19 explain why that information is going to be
20 relevant to the claims or issues that would
21 relate to whatever they may be pursuing [REDACTED]

[REDACTED]
[REDACTED]

23 [REDACTED]

[REDACTED]
[REDACTED]

[REDACTED] [REDACTED]

1 [REDACTED] But
2 the law, I think, doesn't just say: Oh,
3 because Mr. Lanier sent an email three years
4 ago that identified some bullets in an email
5 where they had explained to the Court why it
6 was that that information would be relevant to
7 the dispensing pharmacists and the witnesses in
8 those case. They need to actually come in and
9 explain why it is that this information is
10 going to be relevant to these witnesses.
11 That's, I believe, what the law requires, and I
12 don't think they've even attempted to do it.
13 They are just asking you to rotely subject us
14 to the same requirements that were subjected to
15 the retail pharmacies without making a showing
16 and without ever serving us a document request.
17 And we believe that that's improper.

18 SPECIAL MASTER COHEN: Andrew, do
19 you know if the PBMs served a document request
20 upon plaintiff or plaintiffs for the same kind
21 of documents?

22 MR. HATCHETT: I don't believe we
23 served a document request for personnel files,
24 but we haven't demanded them.

25 SPECIAL MASTER DAVID COHEN: Okay.

1 MR. WASSERMAN: This is Matthew
2 Wasserman for Express Scripts. We had also not
3 demanded personnel files.

4 SPECIAL MASTER COHEN: Mike?

5 MR. ELSNER: Yes. So if we just go
6 through the points of -- that were previously
7 part of the protocol, the first part of the
8 protocol is background information and CVs. I
9 don't think anyone has ever argued that
10 background information and curriculum vitae is
11 information that is somehow protected or
12 somehow information that shouldn't be shared.
13 And for employees like [REDACTED]
14 that have been with the company for [REDACTED] years,
15 those records are incredibly important. They
16 provide detailed information as to what entity
17 they were performing work for over what period
18 of time, what programs they were evaluating
19 over what period of time. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
23 The employee personnel file contains that kind
24 of in real-time information about what roles [REDACTED]
25 was performing for what entity over what period

1 of time. And it's incredibly important. And
2 it's been ordered, produced in multiple MDLs
3 precisely because that type of information is
4 information you can't otherwise obtain from CVs
5 or LinkedIn results. And often witness' memory
6 of what happened and what entity they were
7 performing work for over [REDACTED] years is faulty.
8 And so this information provides critical
9 information.

10 The review information, which is the
11 second point list of bullets, performance
12 review information proved incredibly helpful in
13 all of the prior tracks of the litigation and
14 will prove entirely helpful here because it
15 provides on an annual basis specific
16 information about what that particular employee
17 was working on. For [REDACTED] situation,

18 [REDACTED]
19 [REDACTED], how is it related to
20 opioids, [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED] And I can tell
24 you by example from the CVS case, you know,
25 we've obtained this type of information from

1 Tom Davis, who is an executive vice president.
2 We obtained this information from people all
3 along the chain. And the plaintiffs produced
4 this information from sheriffs to coroners to
5 all types of employees. And in the CVS example
6 we learned only through the production of
7 personnel files that there was specific
8 programming that they had developed related to
9 the diversion of opioids that was not otherwise
10 discussed in any other document that had been
11 provided to us. And we learned that CVS had
12 actually developed an internal program using
13 the exact red flags plaintiffs had developed
14 and tried to implement it and that was
15 otherwise not available. So that type of
16 information and performance reviews is
17 incredibly important. And it's just as
18 important if no work had been done. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

24 As it relates to compensation,
25 compensation affects bias, of course. And I

1 don't know if there was any kind of incentive
2 programming for [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED] I don't know if
6 [REDACTED] maintains stock interests and other
7 interests within the company that might impact
8 the scope of [REDACTED] testimony. We found that with
9 critical witnesses like Tom Davis, Nicole
10 Harrington, among others, that type of
11 information can only be revealed often
12 accurately through the production in a
13 personnel file. And this is consistent with
14 what's been done with every type of witness in
15 the case, even for witnesses from the
16 plaintiffs, which you acknowledged at the time
17 that they probably had no role with respect to
18 opioids. And yet we provided that information
19 and we would do so here.

20 SPECIAL MASTER COHEN: Right. So
21 look, I am bothered by -- a little bit, not a
22 lot, just a little bit, by the lack of a formal
23 request, but I think it's easily explained by
24 the history of this MDL and the understandable
25 understanding on the part of plaintiffs that

1 the requirement was already in place and that
2 they didn't need to ask for it. Again, I
3 remind plaintiffs that they need to be careful
4 about that, that that's an assumption that
5 isn't necessarily valid because we have
6 different defendants. And as they know and I
7 know, those defendants are entitled to point
8 out that they are different and different
9 circumstances adhere.

10 Having said that, I remain of the
11 opinion that this kind of information in
12 personnel files is not only discoverable but
13 relevant and needs to be produced. And I'm
14 also not real happy that this is done on a
15 short time frame, but, again, I understand why.
16 It's because of the background. And so we're
17 only talking about three deponents, and I know
18 they're coming up next week, but I think
19 there's time. And so I'm ordering that the
20 bullet points on Lanier page 3, those sorts of
21 documents, not with reference to opioids, in
22 other words, not restricted by if they're
23 talking about opioids, as was mentioned in
24 email, have to be produced. And, again, that
25 is something the plaintiffs also have to

1 produce even though defendants haven't asked
2 for it formally either. Okay?

3 MR. WASSERMAN: This is Matthew
4 Wasserman for Express Scripts. If I could just
5 push back a little bit on the timing and the
6 idea that we all knew that this was coming. I
7 will just say for Express Scripts we received
8 an email two days ago asking --

9 SPECIAL MASTER COHEN: No, I --

10 MR. WASSERMAN: -- where the
11 production --

12 SPECIAL MASTER COHEN: Yeah, I
13 didn't say that you knew it was coming. I'm
14 saying that even though it's only a few days, I
15 think there's time to get it out, to get those
16 documents produced. Look, we're starting to
17 enter now into our core discovery. And, you
18 know, there are going to be -- I know I'm going
19 to get calls the day of and even during
20 depositions for documents and other rulings.
21 And that's just how it's going to go. We've
22 all been here before. I understand that it's
23 tight. I'm saying you can get it done.

24 MR. WASSERMAN: This is Matthew
25 Wasserman again. If I could just ask for one

1 point of clarification. On page 3, the
2 bullets, it says at the top there's no
3 obligation to create a personnel file. So am I
4 right that if these materials don't exist
5 already, that the PBM defendants and none of
6 the parties are under an obligation to create
7 this information?

8 SPECIAL MASTER COHEN: That is true.

9 MR. WASSERMAN: Okay. Thank you.

10 MR. HATCHETT: So this is Andrew
11 Hatchett for the Optum defendants. I mean, as
12 I sit here today, I don't know how -- I mean,
13 it's obviously 5:00 on a Friday. I don't know
14 what it means. I think the deposition is
15 Tuesday. So I don't know what it will look
16 like for us to access [REDACTED] personnel
17 file. I don't know what's in it. [REDACTED]

18 [REDACTED] But
19 that could be [REDACTED] years of performance reviews.
20 But the order that you're making is that we're
21 not allowed to review those to assess whether
22 or not any of his reviews related to
23 opioid-related issues, but that we have to
24 produce all performance reviews that he ever
25 received during [REDACTED] tenure at the

1 company, and that's true for all employees?

2 SPECIAL MASTER COHEN: Correct.

3 MR. HATCHETT: I don't know if his
4 personnel file has pay stubs for ■ years. I'm
5 just trying to -- without having seen a
6 personnel file, I don't know what this may
7 entail. But would that mean, like, we would
8 need to produce ■ years of pay stubs if those
9 are in the personnel file? Is there any sort
10 of a limitation that might --

11 SPECIAL MASTER COHEN: Well, I don't
12 know how to answer that, Andrew, because I
13 don't know what's there. It seems unlikely to
14 me, having looked at personnel files for other
15 folks, that there are ■ years of pay stubs in
16 anybody's personnel file. I just don't think
17 that's very likely. However, I take your
18 point. You know, you can come back to me and
19 say: Look, this kind of document here is just
20 absolutely out of bounds. We know what your
21 ruling is, but you didn't have this in mind,
22 right? I don't have time to do an in-camera
23 inspection of the whole thing, but I'm not
24 being implacable. If you come back and say:
25 These are documents that we think we shouldn't

1 have to produce, I'm willing to listen. And I
2 can do that ex parte. When I say "ex parte," I
3 mean review documents in camera that you don't
4 think should be produced.

5 MR. WASSERMAN: Special Master
6 Cohen, this is Matthew Wasserman again. Sorry
7 to ask another question about the bullets, but
8 we are just seeing them for the first time
9 today. Unless I'm missing it, there's nothing
10 in these bullets that address compensation.
11 And so am I right to conclude that compensation
12 is not what the plaintiffs are requesting here?
13 They're requesting these three bullets, the CV,
14 the list of positions and then the performance
15 reviews?

16 MS. FITZPATRICK: This is Laura
17 Fitzpatrick. To be clear, we are requesting
18 compensation information. And that exact sort
19 of information was produced in previous tracks
20 for employees that we deposed to be very clear.

21 SPECIAL MASTER COHEN: Compensation
22 and bonuses is actually the first -- if you
23 look at page 1 of the letter, is the first
24 topic. So, I mean, I think that was actually
25 the first thing that was being discussed and

1 was included in the original protocol. And the
2 bullet points on page 3 are kind of "and
3 alsos." The short answer, Mr. Wasserman, is
4 yes, compensation information has to be
5 produced.

6 MR. WASSERMAN: As I read the
7 compensation discussion on page 1, it was
8 compensation for pharmacists, whether bonuses
9 were tied to an incentive to fill quickly.

10 SPECIAL MASTER COHEN: Compensation
11 has to be produced both ways. It's not as
12 though a deponent isn't going to be asked that
13 question.

14 MR. WASSERMAN: And no, I
15 understand. I guess from our perspective it's
16 simply a matter of getting these documents
17 collected, reviewed and produced in the next
18 two days. And so any type of limiter certainly
19 helps us get it out the door faster.

20 SPECIAL MASTER COHEN: Understood.
21 Compensation has to be produced.

22 MR. HATCHETT: This is Andrew
23 Hatchett for the Optum defendants. Looking --
24 again, I'm also reading these letters and stuff
25 for the first time this morning. And it looked

1 to me like there was parts of the earlier
2 orders that discuss redacting bank, Social
3 Security-type information, which may appear on
4 compensation related documents, so...

5 SPECIAL MASTER COHEN: It just -- if
6 what you're complaining about, Andrew, is the
7 capacity of counsel to produce these documents
8 and redact things that need to be redacted in
9 time, it sounds like that's what you're
10 concerned about, I get it.

11 MR. HATCHETT: [Unintelligible]
12 collecting them first [unintelligible] --

13 SPECIAL MASTER COHEN: Yeah.

14 MR. HATCHETT: -- got to know when
15 that can be done at this point.

16 SPECIAL MASTER COHEN: Yeah, that's
17 fair. So look, I am going to say that you can
18 produce this one day before the deposition.
19 Normally it would be three. But the reason
20 that we're here is partly plaintiffs' fault,
21 that they assumed that you already knew that
22 you had to do this, and that wasn't entirely
23 fair. So to help you, I'm going to tell you
24 that at least for the -- when are the
25 depositions? Are there two next week?

1 MR. HATCHETT: Our first is Tuesday.
2 Today would be three days before the
3 deposition. One day before the deposition is
4 Monday. I don't even know if I can get the
5 documents until Monday.

6 SPECIAL MASTER COHEN: Yeah. I
7 mean, that's the problem. That's really the
8 problem.

9 MR. HATCHETT: At this point in time
10 I am not sure that it would be feasible for us
11 to collect, review and produce this information
12 even one day before the deposition if it's a
13 Tuesday deposition next week.

14 SPECIAL MASTER COHEN: Right. [REDACTED]

15 [REDACTED]
16 MR. HATCHETT: [Unintelligible]
17 close of business on Friday.

18 [REDACTED]
19 SPECIAL MASTER COHEN: I understand.
20 Hold on a minute. [REDACTED] is next Tuesday,
21 right?

22 MR. HATCHETT: [REDACTED] is not until
23 January.

24 SPECIAL MASTER COHEN: Okay. So [REDACTED]
25 is not an issue. And who -- what about --

1 sorry. I can't remember names. The third
2 deponent, when is that?

3 MR. WASSERMAN: That's okay. This
4 is Matthew Wasserman. [REDACTED] is Wednesday.
5 So we're in the same position as Optum where,
6 you know, he worked at the company for decades.
7 It's just going to be almost unfeasible, if not
8 not feasible.

9 SPECIAL MASTER COHEN: Right. You
10 know, Mike, you're going to have to make a
11 choice. Because I think it is asking way too
12 much to not only produce these documents when
13 they have no idea they were going to have to
14 but do it in such a rush. And so you're going
15 to have to move the depos, you know, at least
16 seven days or go without them. It's up to you.
17 Obviously that's the scheduling issue. I don't
18 know what to do about it except say that that's
19 only fair. If you want them, you're going to
20 have to move the depos.

21 MR. ELSNER: Special Master Cohen,
22 this is Michael Elsner from Motley Rice for the
23 PEC. Let me just say, with respect to Optum,
24 these materials were requested in an email in
25 the middle of November. The fact that we're

1 arguing this today and the fact that an
2 objection was only raised two days ago, I don't
3 think should excuse them from producing these
4 materials rapidly. I take your point as to
5 timing. I'm happy to discuss that with my
6 team. But if we decide to forgo the deposition
7 at this point in time waiting for the personnel
8 file and delaying it, we still want the --
9 that's one issue that we'll deal with. If we
10 decide to go forward without it, then we still
11 want the production of the personnel file. And
12 I think with respect to [REDACTED], we should be
13 permitted to reopen that deposition and
14 question [REDACTED] as to it when it's produced if it
15 can't be produced --

16 SPECIAL MASTER COHEN: That's my
17 point. We're not going to reopen the
18 deposition for these documents, so you have to
19 make the choice. They do have to be produced,
20 right? So you can choose to do the deposition
21 without the documents and then get them, or you
22 can choose to move the deposition by at least
23 seven days, and the documents have to be
24 produced in time then for that deposition.

25 Now, let me understand something. I

1 do remember now having read something about
2 what you just said, which is that the documents
3 were requested in November, and to this point
4 that hadn't been brought back up. Tell me what
5 that means. The documents had been requested
6 in November, certainly not formally, correct?

7 MR. ELSNER: We served the notice of
8 the deposition. And then after we served the
9 notice of the deposition, I sent an email to
10 counsel for Optum, and I said: Please produce
11 the personnel files [REDACTED]

12 [REDACTED] And I believe that
13 was November 13th. I never received a response
14 to that email. And when I hadn't received a
15 response to that email, I sent a follow-up
16 email, I believe, earlier this week or last
17 week, and then I only got an objection to that
18 follow-up email on Wednesday of this week. I
19 immediately brought it to your attention as
20 soon as I knew that we had an issue. But I
21 didn't think we had an issue at all. I was
22 fully expecting the production of the personnel
23 file 72 hours in advance.

24 MR. WASSERMAN: Special Master
25 Cohen, Matthew Wasserman for Express Scripts.

1 I just want to make clear that is not true for
2 Express Scripts. We only first received the
3 request for personnel files two days ago.

4 MR. MOUGEY: This is Peter Mougey.
5 I've kind of sat quietly listening to this back
6 and forth. And I'm a little confused at the
7 position, and regardless of the timing, whether
8 it was November or -- that these orders and
9 this process have been in place for years. And
10 I don't --

11 SPECIAL MASTER COHEN: I don't know
12 if you just got on the call, Peter, but we've
13 already addressed that. It's simply not true
14 that these orders, A, for every former employee
15 or employee, for every defendant, for every
16 deponent and for every plaintiff, that their
17 personnel files will get produced. It's less
18 than that. And as Judge Polster has explained,
19 even though there might be highly persuasive --
20 even though those rulings might be highly
21 persuasive, the PBMs are different. They're
22 different defendants. They have rights to
23 raise different arguments. And the plaintiffs
24 cannot assume that everything applies every
25 time. I don't think anybody is assuming. The

1 question then -- that begs the question is
2 are -- whichever orders or whatever protocol
3 the defendants believe don't apply to them, I
4 think they need to speak up and say: We're not
5 going to follow this protocol. We're not going
6 to follow this order. This doesn't apply to us
7 for X. It's -- this is going to be an awfully
8 arduous process if everything that we put
9 together in this litigation over the last seven
10 years, which we'll call it the architecture or
11 the infrastructure with all the prior orders,
12 if the defendants believe that this doesn't
13 apply to them. The oneness should be on the
14 defendants to pipe up and say something. I
15 just -- I don't -- I mean, otherwise we're --
16 re -- what's the point of the MDL? I mean,
17 this is the rule of the case.

18 MS. FITZPATRICK: Special Master
19 Cohen?

20 SPECIAL MASTER COHEN: Hold on.

21 MR. HATCHETT: Andrew Hatchett --

22 SPECIAL MASTER COHEN: Wait a
23 minute. Wait a minute, please. Peter, I agree
24 with you except that there was nothing except
25 Docket Number 1183 to give the defendants, the

1 PBM defendants, any notice.

2 Now, what could have happened and
3 what I suggest should happen in the future is
4 that on November 13th when Mike says: Hey, we
5 expect you to follow the protocol and produce
6 personnel files, here's the protocol and here's
7 where we're getting this from. Maybe you did,
8 Mike. I don't know. Look, I'm not going --
9 this isn't going to be relitigated every time.
10 I assure you that that is not true. But this
11 is the first time it has come up, and I'm
12 trying to make clear that it's not an automatic
13 that you guys -- both sides. It's not going to
14 be plaintiffs' burden only. It's not going to
15 be defendants' burden only. Both sides need to
16 communicate better. If you want something and
17 you think that the reason you get it is because
18 of, quote, unquote, the architecture of the
19 MDL, then point to something and do it early
20 and bring it to me. Where are we landing?
21 Pretty much the same place.

22 MS. FITZPATRICK: Special Master
23 Cohen --

24 SPECIAL MASTER COHEN: You have to
25 give everybody a fair chance.

1 Go ahead, Laura.

2 MS. FITZPATRICK: I apologize. I
3 didn't mean to interrupt.

4 Special Master Cohen, this is Laura
5 Fitzpatrick, and only for the sake of the
6 record -- and I apologize that I don't have a
7 specific date to give you, but you will recall,
8 and defendants will be reminded that very early
9 on in this litigation at the beginning of this
10 calendar year, we -- when -- I believe it may
11 have been our very first discovery conference
12 with you, it was over the issue of
13 organizational charts and the PEC's position
14 that in particular the Optum defendants had
15 failed to produce organizational charts. And
16 one of the things that we specifically
17 requested was the production of personnel files
18 in hopes to, you know, reverse engineer or
19 reverse construct the organizational structure
20 of the company. And in that very conference we
21 discussed exactly the fact that in prior tracks
22 and historically defendants have had to produce
23 personnel files for the deponents for the
24 individuals that we noticed for deposition.
25 And my memory -- and forgive me, I don't have

1 the transcript right in front of me, but it is
2 transcribed -- is that we -- you're -- not only
3 did you deny our request for that, but you
4 specifically said that that issue would be --
5 we would deal with that issue when the time
6 came for these depositions. And so I just want
7 to be really clear that this is not -- for the
8 defendants to in any way insinuate that this is
9 the very first time that they have been put on
10 notice that we would be requesting personnel
11 files for individuals to be deposed in this
12 litigation is just not factually correct.

13 Thank you.

14 SPECIAL MASTER COHEN: I do remember
15 that conversation. And if the plaintiffs want
16 to conclude that I've given the PBMs an unfair
17 break, then you can conclude that. But what
18 the break is is a little bit more time to do
19 what has always been required. That's where
20 we're landing. Giving the PBMs a little more
21 time, because I think it's not unreasonable for
22 them to have not known that this was going to
23 be required. And I get that different people
24 can conclude differently on that. That's where
25 I'm landing.

1 MR. FARRELL: David, this is Paul
2 Farrell on behalf of the PEC. We are not going
3 to proceed without the personnel files. So I
4 think that puts us back to the drawing board of
5 picking new dates. And we ask for the PBM
6 defendants to very quickly come up with
7 alternative dates with the idea that we're
8 not -- this isn't a 30-day bump. We're going
9 to ask they that produce the personnel files in
10 seven days and then schedule the depositions
11 very soon thereafter.

12 SPECIAL MASTER COHEN: Yeah. I
13 agree the two deponents who were scheduled for
14 this week, the PBMs need to contact them as
15 soon as possible, explain to them that
16 rescheduling is happening because of me and
17 that they need to pick the next
18 soon-as-possible date.

19 MR. BOONE: Special Master Cohen,
20 this is Brian Boone for Optum Rx. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

24 SPECIAL MASTER COHEN: [REDACTED]

[REDACTED]

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MR. BOONE: [REDACTED]

[REDACTED]

MS. MCGOWAN: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

SPECIAL MASTER COHEN: Well, I want you to try and get it done either the 13th or the 16th [REDACTED]

[REDACTED]

[REDACTED] That should give you time to get the documents out and get the depo done.

MR. MOUGEY: This is Peter Mougey. Just let us know then if it's the 13th or the 16th for ESI, and that will be -- we'll make that work.

MR. BOONE: Special Master Cohen, this is Brian Boone again for Optum Rx. [REDACTED]

[REDACTED] I also need to check with my client because we may want to appeal your ruling today that is, of course, going to affect the timing of all of this too.

1 MR. COOPER: And Special Master
2 Cohen, this is Jonathan Cooper for the Express
3 Scripts defendants. We will discuss with
4 [REDACTED] his availability. I think I heard
5 Mr. Mougey say it needs to be either the 13th
6 or 16th. I just don't know sitting here today
7 what his availability is. So we'll check with
8 him and follow up as soon as we can.

9 SPECIAL MASTER COHEN: [REDACTED]
[REDACTED]
[REDACTED]

12 MR. MOUGEY: This is Peter Mougey.
13 What I said was the 13th or 16th would work or
14 any day on the week of the 16th. I believe
15 that's Monday. So the week of the 16th.
16 Right? [REDACTED]

[REDACTED] No, I'm sorry. I'm
18 talking about ESI. Oh, yeah. This is Peter
19 Mougey. Right. And if we can do it on the
20 13th, that's the in-law Christmas, and I'll
21 send everybody on the ESI team a thank you note
22 so I can miss that.

23 MR. COOPER: I'll tell you,
24 Mr. Mougey, it won't be the 13th because Quinn
25 Emanuel has its partner meeting on

1 December 13th. So I don't think we'll be able
2 to do a deposition then, but we will check with
3 [REDACTED] about his availability and follow up
4 as soon as we can.

5 SPECIAL MASTER COHEN: Okay. We
6 have one other issue that I want to address
7 quickly, and that is production of documents.
8 And --

9 MR. HATCHETT: Special Master Cohen,
10 this is Andrew Hatchett. I can clarify
11 something on that that may make this a lot
12 easier.

13 SPECIAL MASTER COHEN: Go ahead.

14 MR. HATCHETT: Mr. Elsner's response
15 in the email is actually not getting at the
16 issue that we were raising. So we are not
17 asking them to identify any document that may
18 be produced by another party that is going to
19 be used at a deposition. This is an issue that
20 came up in the context of the Jefferson County
21 discovery. And in that case the PBMs didn't
22 have access to all the documents that had been
23 produced in the MDL [unintelligible] documents
24 that were used in the depositions in Jefferson
25 County that we simply didn't have access to.

1 Now, Mr. Elsner's email seems to
2 suggest that we won't have that sort of issue
3 in this litigation because every document that
4 they will be using during a deposition will be
5 a document that has been produced into the MDL
6 under DR-22. If that is the case, then this
7 may be a moot issue. But all we are asking is
8 that if they are going to use any document that
9 has been not been formally reproduced into this
10 MDL under DR-22 for whatever reason that they
11 may have gained access to through cases outside
12 the MDL, through investigations or otherwise,
13 that they should have to provide us copies of
14 those documents in advance of the deposition.
15 That's just preventing, you know,
16 non-Bates-stamped documents, documents that are
17 not otherwise publicly available or accessible
18 to us. That is all we are asking for.

19 MR. ELSNER: Well, this is Michael
20 Elsner. I misunderstood, I suppose, what Optum
21 was requesting. But what they're requesting to
22 me seems completely out of line. Any -- we can
23 depose and impeach a witness with any document
24 that we choose. I thought his concern was is
25 that there may be documents produced by parties

1 that they didn't have access to. And I was
2 clarifying that the concern that they had in
3 Jefferson County wouldn't exist here because
4 they have access to all the MDL documents and
5 all documents from state cases. But if he's
6 suggesting that there are somehow third-party
7 documents that we want to use to impeach the
8 witness with that we have to produce in
9 advance, that's completely inconsistent with
10 the Federal Rules and the practice of this MDL.

11 SPECIAL MASTER COHEN: Yeah. I
12 mean, I agree with both of you, that most of
13 these documents are going to have been produced
14 directly or through DR-22, but also that -- I
15 mean, certainly you can come in with a document
16 that you come across, maybe it's tomorrow's
17 Wall Street Journal, and mark it as an exhibit
18 during the deposition, and it doesn't have to
19 have been disclosed beforehand. So it sounds
20 like I don't need to rule here.

21 MR. HATCHETT: Yeah. So that would
22 be obviously a public document. I'm talking
23 about documents that had been produced to the
24 PEC that they had gained access to through
25 other litigation from nonparties. So we're not

1 asking for them to identify any new source or
2 something public that they may use to impeach
3 the witness. But if they are nonpublic
4 documents that are -- that they had gained
5 access to through litigation or investigations
6 that have not been produced or made accessible
7 to the PBMs through DR-22, those documents
8 should be provided to us.

9 SPECIAL MASTER COHEN: Well, I'm
10 going to assume that's a null set or that I'm
11 going to have to deal with it when it comes up.
12 As to your concerns about, you know, those
13 documents not being what they purport to be or
14 things like that, of course, even that can be
15 dealt with after the fact, you know, as
16 authenticity or completeness. So I'm not
17 sensing that I need really to make a ruling
18 here. If something comes up, we'll deal with
19 it.

20 MR. HATCHETT: Understood.

21 SPECIAL MASTER COHEN: Okay. That's
22 all I have on my list of things to chat about.

23 Does anybody else have anything else
24 they want to raise?

25 MR. MOUGEY: This is Peter Mougey.

1 Just for purposes of clarity, today is Friday.
2 I'm -- can we set -- is Tuesday a reasonable
3 time to get a date for the following week for
4 at least ESI? And I understand that we're
5 checking on the 13th and 16th for Optum.

6 SPECIAL MASTER COHEN: Can we figure
7 out --

8 MR. WASSERMAN: I think -- this is
9 Matthew Wasserman. I mean, we will contact
10 [REDACTED] as soon as we can, but it is Friday
11 evening. I mean, he might need more than one
12 day to get back to us, but -- I mean, we will
13 commit to getting in touch with him and getting
14 availability from him as quickly as possible,
15 but I can't promise it will be done in one day.

16 MR. MOUGEY: I -- Special Master
17 Cohen, I think my calculator -- calendar looks
18 like -- today is Friday, and I thought it said
19 Tuesday, which to me is four days and. You
20 know, the day that we have cell phones and can
21 reach, send texts and emails, that seems pretty
22 reasonable. I just felt that Tuesday would be
23 nice to be able to plan for the following week
24 with moving people and documents and things
25 around. So I think that's a reasonable time,

1 Special Master Cohen, to get a heads-up of what
2 we're looking at. I mean, quite frankly, I
3 don't want to retread old ground, but this
4 should be plenty of time to get the documents.

5 SPECIAL MASTER COHEN: Look, I take
6 the defendants at their word that they will
7 reach out to the deponents as soon as we hang
8 up via text, email or phone call and explain
9 circumstances and ask them as soon as they can,
10 preferably on that phone call, when a
11 replacement date can occur and report back to
12 the plaintiffs as soon as possible. I agree it
13 should all be able to happen before Tuesday.

14 MR. HATCHETT: Special Master Cohen,
15 this is Andrew Hatchett for the Optum
16 defendants. At this time, and we'll
17 obviously -- if we can make contact with people
18 immediately after this teleconference, we will
19 do so. As I indicated earlier, I just don't
20 know how quickly we can obtain, review, redact
21 and produce the personnel file. As Brian
22 indicated, we're going to talk to our client
23 about whether we need to object and otherwise.
24 But if we're able to make an assessment, you
25 know, before midday on Sunday, we'll notify the

1 plaintiffs too. If for whatever reason we
2 don't object and we're able to produce the
3 information and we can move forward right now,
4 that seems unlikely, but that is obviously
5 still something that is in the cards,

6 [REDACTED]

7 [REDACTED]

8 SPECIAL MASTER COHEN: All right.
9 And as far as -- if you decide that you want to
10 object, that needs to happen by Monday at 5:00.
11 And I simply note that, as I stated in the
12 email where I'm discussing the Lanier letter, I
13 had had conversations with the Court about all
14 of that, and that's -- so those bottom lines
15 were reached. That ruling was reached in
16 consultation with the Court. But that, you
17 know, is just -- I'm just highlighting that.
18 You can do whatever you need to do.

19 MR. HATCHETT: Understood. Thank
20 you.

21 MR. ELSNER: This is Michael Elsner.
22 Just for your benefit, trial witnesses were
23 also required to have their personnel file
24 produced in advance of trial. So the Court
25 reconsidered all of these issues at the eve of

1 the CT7 trial and reaffirmed them again.

2 SPECIAL MASTER COHEN: Yeah.

3 Actually, Mike, if you could send that out to
4 the extent that's documented, it would be
5 helpful to me and the defendants, I think, and
6 the Court.

7 MR. ELSNER: Yeah. I don't know
8 that it was issued by a formal order by Judge
9 Polster, but I think it was -- I'll see what --
10 how that was documented at the time. But I
11 know that arguments were made in that regard.
12 I know ultimately an agreement was reached, but
13 I believe it was in a conference with you or
14 with Judge Polster.

15 SPECIAL MASTER COHEN: Yeah, I
16 remember it's true. I just don't know where
17 it's documented, if it is.

18 Okay, everybody, have a good
19 weekend. Thank you all. I appreciate it. And
20 that's it.

21 (Proceedings concluded at 5:39 p.m.)

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